In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 619

MANCHESTER BAND OF POMO INDIANS, INC.,
PETITIONER

v.

HON. ALFONSO J. ZIRPOLI, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals did not write an opinion. Its order denying the petition for a writ of mandamus appears at Pet. App. A. The order of the district court appears at Pet. App. B.

JURISDICTION

The order of the court of appeals was entered on June 23, 1969. The petition for a writ of certiorari

was filed on September 19, 1969. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a single district judge correctly concluded that the special provisions of federal law governing the investment of Indian trust funds raise no substantial issues of equal protection of the laws as would require the convening of a three-judge district court.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution and the relevant statutes are set forth in the Petition at pages 3-5 and App. D.

STATEMENT

This matter arises out of the order of the Court of Appeals for the Ninth Circuit denying a petition for a writ of mandamus to require Honorable Alfonso J. Zirpoli to convene a three-judge district court pursuant to 28 U.S.C. 2282, 2284. The application for a three-judge court was filed in connection with a suit by the Tribe against the United States of America, the Secretaries of the Interior and Treasury, and officers of the Bureau of Indian Affairs for injunctive and money relief. Petitioner asserts (Pet. 5-9) that 25 U.S.C. 161a, which provides that Indian trust funds in the Treasury receive 4% simple interest, and 25 U.S.C. 162a, which limits such in-

vestments to bonds issued or guaranteed by the United States, are unconstitutional in that they deny the Indians the benefits of other federal laws under which government-managed trust funds receive at least 5% compound interest from investments which may include certain federal agency bonds neither issued nor guaranteed by the United States. This differing treatment, petitioner alleges (Pet. 9), amounts to an unconstitutional racial discrimination against Indians.

ARGUMENT

The decision of the court of appeals is plainly correct and does not conflict with the controlling decisions of this Court or the decisions of any court of appeals. Accordingly, there is no occasion for further review.

1. A three-judge court need be convoked only where the constitutional question posed is substantial. As this Court stated in *Bailey* v. *Patterson*, 369 U.S. 31, 33, such a court is not required "when the claim that a statute is unconstitutional is wholly unsubstantial, legally speaking nonexistent. * * *"

2. The different treatment by Congress of Indian trust funds compared with other trust funds does not constitute a forbidden racial discrimination. The suggestion that it does rests on the premise that statutes designating and treating Indians as a special class are constitutionally arbitrary. But class legislation affecting Indians, as distinct from class legislation affecting Negroes, Chinese, and Jews, is a settled feature both of the federal constitution and of federal

laws. Thus, Congress is explicitly given the power to regulate "Commerce * * * with the Indian tribes," Const. Art. I, Sec. 8, cl. 3, a power which readily comprehends the fixing of interest on tribal funds in the government's trust. The whole of Title 25 of the United States Code demonstrates a congressional recognition that class legislation discriminating between Indians and others is constitutionally appropriate. This conscious and deliberate congressional policy toward the Indians is not proscribed racial discrimination, but an exercise of plenary authority not subject to judicial control. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565. As a three-judge district court stated in rejecting a similar contention recently:

> * * * if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race". Indians can only be defined by their race.

Simmons v. *Eagle Seelatsee*, 244 F.Supp. 808, 814 (E.D. Wash.), affirmed, 384 U.S. 209. That reference, in the case of Indians, does not establish that forbidden racial discrimination has occurred.

In particular, it is clear that Congress had no forbidden discriminatory purpose when in 1929, 45 Stat. 1164, and then again in 1930, 46 Stat. 584, it enacted the four percent interest provision of which petitioner particularly complains. Whether a correct reading of existing law or not, the then current understanding, of which Congress was aware, was that Indians were due *no* interest on their trust funds deposited in the Treasury unless treaties specifically provided for it. H.Rep. No. 2320, 70th Cong., 2d

Sess.; S. Rep. No. 1396, S. 5180, 70th Cong., 2d Sess. (1929). There is no constitutional obligation to pay interest on trust funds; accordingly, the congressional decision to pay interest at four percent, viewed in the light of the information before it about the existing state of the law, was entirely consistent with its obligations under the Fifth Amendment. *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715-718. In any event, the 1929 and 1930 acts, now embodied in 25 U.S.C. 161a, leave open the possibility of a higher rate of interest if "otherwise authorized by law."

Whether five percent compound interest is in fact still authorized by law is a more difficult question than might appear from the face of what is now 31 U.S.C. 547a. That provision was enacted in 1841, 5 Stat. 465; in 1880, Congress passed a statute specifically relating to Indian trust funds and providing that they should earn interest at the rate "stipulated by treaties or prescribed by law." 21 Stat. 70. This Act was then treated as abrogating the general five percent requirement of 5 Stat. 465, and we understand the five percent provision to have had no use since. Whether that was a correct reading of the 1880 Act's effect, or indeed whether *that* statute, not here sought to be enjoined, was constitutional, are not questions which require the convening of a three judge district court, however. They may be tried out on the merits of petitioner's complaint before the single judge before whom that complaint is now pending.[1]

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[1] Section 162a of Title 25, U.S.C., the other provision petitioner seeks, in part, to enjoin, is entirely permissive and

The constitutional challenges to the acts whose enforcement petitioner seeks to enjoin are insubstantial. It follows that the request to convene a three-judge district court was properly denied. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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again subject to the condition that the interest rates obtained in the manner provided must at least equal those which the United States is "obligated by law to pay." Careless handling of Indian funds and resultant losses in earlier years, rather than any discriminatory purpose, was the obvious motivating factor of this enactment.

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